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# A Third Revolution in Family Dispute Resolution: Accessible Legal Professionalism

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## A Third Revolution in Family Dispute Resolution: Accessible Legal Professionalism

By Noel Semple<sup>1</sup>

When Canada's worst access to justice problems are listed, family law always makes the list.<sup>2</sup> Although comprehensive legal remedies now exist for the dislocations and financial inequities caused by separation,<sup>3</sup> people have great difficulty obtaining any benefit from those remedies. Recent empirical research makes this very clear.<sup>4</sup> Today, workable solutions to enhance access to family justice are being developed by researchers and commentators. Public sector innovation – including in family courts, government ministries, law schools, and legal aid programs – has been the focus of

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<sup>2</sup> Action Committee on Access to Justice in Civil and Family Matters Family Justice Working Group, *Meaningful Change for Family Justice: Beyond Wise Words* (Ottawa: ACAJCFM, 2013) online: ACAJCFM <<http://www.westcoastleaf.org/userfiles/file/FJWG%20report%20Meaningful%20Change%20Consultation%20Jan%202013.pdf>> (last accessed: 3 June 2016); R. Roy McMurtry *et al.*, *Listening to Ontarians: Report of the Ontario Civil Legal Needs Project* (Toronto: Ontario Civil Legal Needs Project Steering Committee, 2010) online: Law Society of Upper Canada <[http://www.lsuc.on.ca/media/may3110\\_oclnreport\\_final.pdf](http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf)> (last accessed: 3 June 2016); Carol Rogerson, "Shaping Substantive Law to Promote Access to Justice: Canada's Use of Child and Spousal Support Guidelines" in John Eekelaar, Mavis Maclean & Benoit Bastard eds., *Delivering Family Justice in the 21st Century* (Oxford: Hart Publishing, 2015); Noel Semple, "The Cost of Seeking Civil Justice in Canada" (2015) 93 Canadian Bar Review 639, online: <<http://ssrn.com/abstract=2616749>> (last accessed: 3 June 2016) at 669.

<sup>3</sup> Part 3, *infra*.

<sup>4</sup> Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants* (Kingsville, Ontario: Representing Yourself in a Legal Process, 2013) online: RYLP <<http://representingyourselfcanada.com/2014/05/05/research-report/>> (last accessed: 3 June 2016).

much of this work.<sup>5</sup> However, private sector, client-paid family law practice has not yet received the same level of attention in the scholarship.<sup>6</sup>

Innovation in family law *firms* can tangibly improve access to justice in Canada: this article develops that claim by drawing on empirical data and scholarship about Canadian family law. Part 1 explains how and why legal needs arising from the dissolution of intimate relationships are so difficult the parties to meet. This Part draws on civil legal needs surveys, surveys with lawyers, and data from interviews with litigants. The focus shifts to family law firms (including sole practitioners) in Part 2, using new empirical data about the Canadian lawyers who do this work. Three promising opportunities to innovate for accessibility in family law practice are identified: (i) innovative fee structure; (ii) innovative service variety; and (iii) innovative division of labour. A *third revolution* in Canadian family law is proposed in Part 3. Our family law *doctrine* was revolutionized beginning in the 1960s, and family law *alternative dispute resolution* was similarly transfigured beginning in the 1980s. It is now time to foment a third revolution, in family law *practice accessibility*, to bring the benefits of family justice to all Canadians who need them.

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<sup>5</sup> Action Committee on Access to Justice in Civil and Family Matters, *Access To Civil & Family Justice: A Roadmap for Change* (2013) [http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC\\_Report\\_English\\_Final.pdf](http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf) (last accessed: 3 June 2016); Law Commission of Ontario, *Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity* (Toronto: LCO, 2013) online: LCO <<http://www.lco-cdo.org/family-law-reform-final-report.pdf>> (last accessed: 3 June 2016); Noel Semple and Nicholas Bala, *Reforming the Family Justice System: An Evidence-Based Approach (Report commissioned by the Association of Family and Conciliation Courts, Ontario Chapter)* (Toronto: AFCC Ontario Chapter, 2013) online: SSRN <<http://ssrn.com/abstract=2366934>> (last accessed: 3 June 2016); Advocates' Society, *Family Justice Reform Project* (Toronto: The Advocates' Society (Ontario), 2014) online: The Advocates' Society (Ontario) <[http://www.advocates.ca/assets/files/pdf/news/Family\\_Justice\\_Reform\\_Paper-Grassroots\\_Project\\_oct6.pdf](http://www.advocates.ca/assets/files/pdf/news/Family_Justice_Reform_Paper-Grassroots_Project_oct6.pdf)> (last accessed: 3 June 2016).

<sup>6</sup> However, the Canadian Bar Association's Futures Initiative has focused on innovation in Canadian legal practice generally: see CBA Legal Futures Initiative, *Futures: Transforming the Delivery of Legal Services in Canada* (Ottawa: Canadian Bar Association, 2014) online: CBA <<http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf>> (last accessed: 3 June 2016) at 31.

## Part 1: Access to Family Justice

### 1.1 Needs and Remedies

What exactly is included in family law? Legal needs that arise from the dissolution of intimate relationships between cohabiting adults are family law needs, for the purposes of this paper.<sup>7</sup> Our law includes three broad categories of remedy for family law needs:

1. Financial family law, including child support, spousal support, matrimonial property division, and matrimonial home remedies. These remedies are meant to provide equitable division of the fruits of the relationship, and of the costs of its dissolution.
2. Child custody and access law, which allocates post-separation parenting rights and responsibilities with the stated goal of maximizing the best interests of the child(ren).
3. Legal measures to prevent domestic violence, borrowed from criminal law, are also now central to family law.

These remedies are found in the federal *Divorce Act*, in provincial legislation, and in a deep body of case law.<sup>8</sup> In addition to divorce, the intimate relationships in question include long-term non-marital relationships, whose parties are treated like married people for some (although not all) purposes under Canadian family law. Members of same-sex and members of opposite-sex relationships are now treated equally under separation-related family law in this country.<sup>9</sup>

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<sup>7</sup> Thus, child protection cases and the drafting of cohabitation contracts are not part of the focus here.

<sup>8</sup> Another important doctrinal source, which has been incorporated through jurisprudence, is Carol Rogerson and Rollie Thompson, *Spousal Support Advisory Guidelines (Final Version)* (Ottawa: Department of Justice (Canada), 2008) online: Department of Justice (Canada) <<http://www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/g-ld/spag/index.html>> (last accessed: 3 June 2016).

<sup>9</sup> *Civil Marriage Act*, S.C. 2005, c. 33; *Halpern v. Toronto (City)* (2003), 36 R.F.L. (5th) 127 (Ont. C.A.) and subsequent jurisprudence.

## 1.2 Family Law: An Access to Justice Quagmire

Several factors make family law a significant access to justice problem. First, large numbers of people are involved. Four in every ten Canadian marriages are expected to end in divorce.<sup>10</sup> Unmarried cohabitants are even more likely to separate before death does them part.<sup>11</sup> Although some separations occur without any conflict or legal needs, many do not. Within a three year period, 1,216,497 Canadians (5.1% of the adult population) reported experiencing a family law problem that was “serious... and not easy to fix” according to the 2014 National Legal Problems Survey.<sup>12</sup>

What factors distinguish family law needs from other legal needs and make this area an access to justice quagmire? Family law needs are challenging, first, for the same reasons that other “personal plight” legal needs are challenging. However, they are in some ways *more* legally challenging than many other personal plight needs, for reasons considered in Part 1.4.

## 1.3 Family Law as Personal Plight

The “personal plight” sector includes all legal needs that (i) are experienced by individuals (as opposed to corporations or state bodies), and (ii) arise from disputes as opposed to transactions, regulatory compliance efforts, or planning.<sup>13</sup> Criminal defence law, employee-side employee law, and plaintiff-side personal injury law are all examples of personal plight. Other individual legal needs which frequently go unmet –

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<sup>10</sup> Mary Bess Kelly, *Divorce cases in civil court, 2010/2011* (Ottawa: Juristat: Canadian Centre for Justice Statistics, 2012).

<sup>11</sup> Anne-Marie Ambert, *Cohabitation and Marriage: How are they Related?* (Ottawa: Vanier Institute for the Family, 2005).

<sup>12</sup> Trevor C.W. Farrow *et al.*, *Everyday Legal Problems and the Cost of Justice in Canada: Overview Report* 2016) at 7; Canadian Forum on Civil Justice, *Everyday Legal Problems And The Cost Of Justice In Canada: Survey* 2016) at 2.

<sup>13</sup> John P. Heinz and Edward O. Laumann, *Chicago lawyers : the social structure of the bar* (New York: Russell Sage Foundation and American Bar Foundation, 1982); John P. Heinz *et al.*, *Urban Lawyers: The New Social Structure Of The Bar* (Chicago: University of Chicago Press, 2005).

for example lacking a will or lacking appropriate legal advice on signing a mortgage<sup>14</sup> - are considered "personal business" needs as opposed to personal plight because they do not arise from disputes. Access to justice is problematic throughout the personal plight sector, for several reasons.

### 1.3.1 Legal Inexperience in Personal Plight

Unlike corporations, individuals are usually inexperienced "one-shotters,"<sup>15</sup> who have never experienced their type of legal need before.<sup>16</sup> Legal inexperience increases the psychological costs of the the legal need for the person experiencing it.<sup>17</sup> It also makes it more difficult for the person to reach an acceptable resolution without professional help.

### 1.3.2 Underlying Crisis in Personal Plight

Second, personal plight needs are usually caused by an underlying life crisis. Car crashes, arrests, and marital breakdowns are stressful experiences even if no legal needs arise from them.<sup>18</sup> The legal needs that typically do arise from them must be dealt with at the same time that the person deals with the underlying crisis that gave rise to the need.<sup>19</sup> This compounds the challenge of addressing the legal need in a way that is not experienced by those who need wills drafted or need real estate to be conveyed. In the case of family law the emotional and financial crisis of separation is

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<sup>14</sup> Gillian K. Hadfield, "Higher Demand, Lower Supply? A Comparative Assessment of the Legal Landscape for Ordinary Americans" (2010) 37 Fordham Urban Law Journal 129, online: < at 132.

<sup>15</sup> Marc Galanter, "Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change" (1974) 9 Law & Society Review 59, online: <

<sup>16</sup> Action Committee on Access to Justice in Civil and Family Matters Family Justice Working Group, "Meaningful Change for Family Justice: Beyond Wise Words," *supra* note 2 at 16-17.

<sup>17</sup> Semple, "The Cost of Seeking Civil Justice in Canada," *supra* note 2.

<sup>18</sup> Action Committee on Access to Justice in Civil and Family Matters Family Justice Working Group, "Meaningful Change for Family Justice: Beyond Wise Words," *supra* note 2 at 14-15.

<sup>19</sup> Semple, "The Cost of Seeking Civil Justice in Canada," *supra* note 2 at 665.

often compounded by anxiety for the future and domestic violence (which is present in the majority of intimate relationships that end in voluntary separation).<sup>20</sup>

### 1.3.3 Legal Fee Affordability in Personal Plight

Retaining professional legal help is the obvious way to reduce the temporal and emotional costs of addressing a personal plight legal need.<sup>21</sup> However legal fees for personal plight needs as opposed to other legal needs tend to be difficult to afford, even in cases where they are modest in absolute terms. Unlike a corporation's legal fees, personal plight legal fees cannot be deducted from the client's income for tax purposes. In Canada, legal services are now fully subject to sales tax (GST/HST), and in some parts of the country they are taxed *more* onerously than other goods and services.<sup>22</sup>

Executives of a corporation pay its legal fees from shareholders' pockets; a personal plight client must pay from her own pocket. Borrowing to pay a personal plight legal fee is much more difficult than it would be for a lawyer's fee on transferring a home, because there is typically no large asset available to secure a loan. Finally, because personal plight legal needs are so often unanticipated, they cannot be planned for or saved up in advance (by contrast to a legal fee to draft a will or arrange an adoption).

### 1.4 Family Law: Compared to Other Personal Plight

Access to family law justice also faces unique impediments which do not apply to other personal plight legal needs. This section will compare family law with other

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<sup>20</sup> Jessica Pearson, "Mediating When Domestic Violence Is a Factor: Policies and Practices in Court-Based Divorce Mediation Programs" (1997) 14 *Mediation Quarterly* 319 at 320; Desmond Ellis, "Divorce and the Family Court: What Can Be Done about Domestic Violence?" (2008) 46 *Family Court Review* 531 at 531.

<sup>21</sup> Semple, "The Cost of Seeking Civil Justice in Canada," *supra* note 2.

<sup>22</sup> Canadian Bar Association British Columbia Branch, "Double Taxation on Legal Fees and Other Professional Services (Resolution 13-07-A)," <.

personal plight legal needs, with a view to explaining why family law is an access to justice quagmire.

#### 1.4.1 Prevalence and Severity of Personal Plight Needs: How does Family Law Compare?

Data from civil legal needs surveys paints a somewhat complex picture on this point. Family law problems were by far the most frequently mentioned legal problems for which people wished to have legal help according to the 2009 Ontario Civil Legal Needs (OCLN) survey.<sup>23</sup> When asked the question “for what types of problems or issues did you seek assistance?” the OCLN respondents mentioned family law problems more than twice as often as any other type of problem.<sup>24</sup> “Family relationship problems” were identified by 12.1% of the respondents (30% of those who mentioned any type of civil legal problem), compared to 5.6% or less for all other problem types.<sup>25</sup>

However, a very different finding came from the National Legal Problems Survey (NLPS) conducted in 2014, which had a larger and a more comprehensive sample of adult Canadians than the OCLN.<sup>26</sup> According to this data, consumer, debt, and employment problems are significantly more common than family law problems in Canadians’ lives.<sup>27</sup> Most other civil legal needs surveys in Canada and abroad have

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<sup>23</sup> McMurtry *et al.*, “Listening to Ontarians: Report of the Ontario Civil Legal Needs Project,” *supra* note 2; Environics Group, *Civil Legal Needs of Lower and Middle-Income Ontarians: Quantitative Research* (Toronto: Environics Research Group, 2009) online: Law Society of Upper Canada < at 1-2. Only Ontarians with household income less than \$75,000 were surveyed for the OCLN.

<sup>24</sup> Environics Group, “Civil Legal Needs of Lower and Middle-Income Ontarians: Quantitative Research,” *supra* note 23 at 16; Jamie Baxter, Michael Trebilcock and Albert Yoon, “The Ontario Civil Legal Needs Project: A Comparative Analysis of the 2009 Survey Data” in Michael Trebilcock, Anthony Duggan & Lorne Sossin eds., *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012).

<sup>25</sup> Environics Group, “Civil Legal Needs of Lower and Middle-Income Ontarians: Quantitative Research,” *supra* note 23 at 16.

<sup>26</sup> The NLPS surveyed 3,263 adult Canadians from across the country and unlike the OCLN was not limited by household income: David Northrup *et al.*, *Design And Conduct Of The Cost Of Justice Survey* (Toronto: 2016) online: Canadian Forum on Civil Justice <.

<sup>27</sup> Respectively, these problem types were reported by 22.6%, 20.8%, and 16.4% of adult Canadians asked to think about serious/difficult to fix problems arising in the previous three years. Problems with neighbours were reported by 9.8% and discrimination problems were reported by 5.3%: Farrow *et al.*, “Everyday Legal Problems and the Cost of Justice in Canada: Overview Report,” *supra* note 12 at 8.



reached similar conclusions: family law needs are prevalent but not in the top 3 categories.<sup>28</sup>

Baxter, Trebilcock and Yoon offer a convincing explanation for the OCLN's outlier placement of family law problem in the top rank for problem prevalence. The OCLN survey asked respondents an open-ended question about the legal needs they had experienced, whereas the NLPS and other civil legal needs surveys prompted respondents with a series of queries about various problem types. Absent such a prompt, respondents are less likely to recognize consumer, debt, and employment problems as being "legal" in nature.<sup>29</sup> This reflects limited *legal consciousness*, defined by Les Jacobs as "an individual's knowledge or awareness of the law and its potential for resolving disputes and affecting social change."<sup>30</sup>

Legal consciousness is high for family law needs relative to some other personal plight legal needs (e.g. consumer and debt problems).<sup>31 32</sup> The financial, child-related,

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<sup>28</sup> Baxter, Trebilcock and Yoon, "The Ontario Civil Legal Needs Project: A Comparative Analysis of the 2009 Survey Data," *supra* notes *supra* note 24; Ab Currie, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians* (Ottawa 2007) online: Department of Justice Canada < at 15.

<sup>29</sup> Baxter, Trebilcock and Yoon, "The Ontario Civil Legal Needs Project: A Comparative Analysis of the 2009 Survey Data," *supra* note *supra* note 24 at 77.

<sup>30</sup> Lesley Jacobs, *Mapping the Legal Consciousness of First Nations Voters: Understanding Voting Rights Mobilization* (Ottawa: 2009) online: Elections Canada < at 10 and FN10.

<sup>31</sup> Noel Semple and Carol Rogerson, "Access To Family Justice: Insights And Options" in Michael Trebilcock, Anthony Duggan & Lorne Sossin eds., *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) at 419.

<sup>32</sup> NTD see the paper re "problem type trumps all" and add this : "numerous studies have concluded that the type of problem experienced by the individual is a strong indicator of whether they will seek legal

advice.<sup>2</sup> This appears to be the situation in Ontario where those categories that qualify for either legal aid certificates or duty counsel – being family, immigration and housing – had some of the highest percentage of respondents who contacted a lawyer (53.6%, 45.5% and 41.7% respectively). By contrast, the three most frequently experienced problem categories – being debt, employment and consumer problems – all had a fairly low rate of contacting a lawyer (21.6%, 19.2% and 17.1% respectively).

(<http://www.cfcj->

[fcjc.org/sites/default/files//The%20Resolution%20of%20Legal%20Problems%20in%20Ontario.pdf](http://www.cfcj-))

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and domestic violence-related needs arising from separation are broadly recognized by the people who experience them to have legal dimensions and potential legal solutions. A related point is that, compared to some other major life transitions (e.g. termination of employment), separation is more heavily legalized by our system. For example, even completely uncontested divorce still requires a court order in this country.<sup>33</sup>

#### 1.4.2 Family Law Needs in Court

In light of these factors, it is not surprising that a full third of all the cases heard in Canadian civil courts are family law cases even though other civil legal problems arise more frequently in people's lives.<sup>34</sup> There are pervasive unmet needs in family law court. With 50-70% of family litigants self-represented, only small claims courts and certain tribunals have fewer lawyers in them than our family courts do.<sup>35</sup>

In family court as elsewhere, financial reasons are by far the most common reasons cited by self-represented litigants for why they are self-represented.<sup>36</sup> This obviously reflects a mismatch between SRLs' financial resources and the price of legal services.<sup>37</sup> However, it also in some cases reflects a lack of sufficient perceived value in the legal services available.<sup>38</sup> As Julie MacFarlane puts the point, many SRLs "do not

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<sup>33</sup> *Divorce Act*, R.S.C. 1985, (2d Supp.), c. 3 at s. 8(1). See also Currie, "The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians," *supra* note 28 at 5-6.

<sup>34</sup> Kelly, "Divorce cases in civil court, 2010/2011," *supra* note 10 at Text Box 2. This statistic is based on "seven reporting provinces and territories (Nova Scotia, Ontario, Alberta, British Columbia, Yukon, Northwest Territories and Nunavut, representing 66% of Canada's population)." It includes uncontested divorces.

<sup>35</sup> Department of Justice (Canada), *The Unified Family Court Summative Evaluation Final Report* (Ottawa: 2009) online: DOJ <.

<sup>36</sup> Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants," *supra* note 4 at 32; Rachel Birnbaum, Nicholas Bala and Lorne Bertrand, "The Rise of Self-Representation in Canada's Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers & Litigants" (2013) 91 Canadian Bar Review 67, online: < at 76.

<sup>37</sup> Section 2.1, *infra*.

<sup>38</sup> Mary Eberts, "'Lawyers feed the Hungry:' Access to Justice, the Rule of Law, and the Private Practice of Law" (2013) 76 Sask. L. Rev. 115, online: < at 125.

accept that the work performed by legal counsel should be as costly as it is.”<sup>39</sup>

Moreover, after procedural reform and shifts in public perception, representing oneself is now perceived as a conceivable, albeit not ideal, option. Some SRLs are confident in their ability to represent themselves,<sup>40</sup> although this confidence often dissipates as the proceeding grinds on.<sup>41</sup> Clearly, family court is a deep well of unmet legal needs.

### 1.4.3 Family Law Needs Out of Court

Court appearances and contested adjudications are rare; most separating people reach consensual financial and childcare arrangements.<sup>42</sup> However, unmet legal needs are also rife in non-litigated separations. Even if they know that the law offers a remedy, many people don’t know the details and therefore walk away from their entitlements. Others have a good idea of their entitlements under family law, but abandon them because they cannot afford the financial, temporal, and emotional cost of pursuing them.<sup>43</sup>

Whether inside or outside of court, competent legal assistance is of great help to people seeking access to family justice. The NLPS found 81% of people who had

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<sup>39</sup> Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants," *supra* note 4 at 40. See also Birnbaum, Bala and Bertrand, "The Rise of Self-Representation in Canada’s Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers & Litigants," *supra* note 36 at 76: "For many middle income individuals... the decision not to retain a lawyer is often at least in part based on their assessment that, given their income and asset level, the value of having a lawyer would not justify the cost. In other words, they have absolute ability to pay, but given the costs of legal services and their perceptions of its limited value for them, they have chosen to spend their money on other priorities."

<sup>40</sup> Birnbaum, Bala and Bertrand, "The Rise of Self-Representation in Canada’s Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers & Litigants," *supra* note 36 at 78.

<sup>41</sup> Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants," *supra* note 4 at 50-55.

<sup>42</sup> "In 2010/2011, the majority of active divorce cases (80%) in the reporting jurisdictions were uncontested, with the remaining 20% being contested or disputed cases." (Kelly, "Divorce cases in civil court, 2010/2011," *supra* note 10).

<sup>43</sup> Semple, "The Cost of Seeking Civil Justice in Canada," *supra* note 2; Paul Millar, *The Best Interests of Children: An Evidence-Based Approach* (Toronto: University of Toronto Press, 2009) at 118-9.

obtained legal advice for a civil legal need were satisfied with that advice.<sup>44</sup> Why then is such assistance so hard for separating people to obtain? The financial characteristics of family law cases, combined with adverse public policy decisions, help put family law firms help out of reach for most Canadians.

#### 1.4.4 No Pot of Gold at the End of the Rainbow

In some personal plight cases, there is a “pot of gold” expected at the end of the dispute “rainbow”. Estate litigants, for example, can reasonably expect to receive a settlement from the estate being contested. The anticipated “pot of gold” may allow the firm to defer billing until the end of the case.<sup>45</sup> Even if not, the bequest is typically a windfall that improves the overall financial position of the litigant, and improves his or her ability to absorb the legal fees required to secure it.

A personal injury plaintiff has no windfall in the offing; at best (s)he will receive money to compensate her for what she has lost. However, in most cases, it is more or less certain that something will eventually be paid by the defendant insurer, after settlement or judgment. This anticipated pot of gold allows personal injury firms to accept payment on a contingency basis, which is significantly more affordable to the client than the upfront cash retainers typically required by family law firms.

Divorce, by contrast, is a financial blow even if it involves no legal fees. The net family income that previously supported one household will be required to support two households going forward. There is typically no pot of gold at the end of the rainbow.

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<sup>44</sup> Farrow *et al.*, “Everyday Legal Problems and the Cost of Justice in Canada: Overview Report,” *supra* note 12 at 10. See also Ipsos Reid, *Albertans Satisfied With Their Lawyers* (Public Release Date: May 18, 2010) 2010).

<sup>45</sup> Even if the client must pay a large cash retainer and time-based bills, these are easier to manage through short-term borrowing if the client knows that a bequest is in the offing.

The legal fees compound the existing financial blow suffered by the separating parties, especially if the family law firm requires a large cash retainer upfront.<sup>46</sup>

#### 1.4.5 Lack of Legal Aid

Public policy decisions have also made access to family justice difficult compared to other personal plight needs. Legal aid funding generally deprioritizes family law relative to other personal plight legal needs such as criminal law.<sup>47</sup> The certificates that entitle one to a full-service family lawyer paid for by the state are especially difficult to come by in most parts of the country. This reflects Supreme Court of Canada decisions that mandate legal aid for cases imperiling individuals' Charter interests (e.g. cases threatening incarceration, or state apprehension of one's children),<sup>48</sup> but not for separation-related family law cases, which generally don't involve the state.<sup>49</sup>

#### 1.4.6 Lack of Paralegal Service

Independent paralegals are trained and regulated legal experts who typically charge significantly less than lawyers do.<sup>50</sup> Paralegals may offer a relatively affordable option for some personal plight legal needs, for example those arising from

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<sup>46</sup> See Section 2.1, *infra*.

<sup>47</sup> Michael Trebilcock, *Report of the Legal Aid Review* (Toronto: Ministry of the Attorney General (Ontario), 2008) online: Ministry of the Attorney General (Ontario) < at 75-6.

<sup>48</sup> *New Brunswick (Minister of Health & Community Services) v G. (J.)*, [1999] 3 S.C.R. 46, [1999] S.C.J. No. 47, 177 D.L.R. (4th) 124, 50 R.F.L. (4th) 63; *R. v. Rowbotham*, 1988 CanLII 147 (ON CA).

<sup>49</sup> *British Columbia (Attorney General) v Christie*, [2007] 1 S.C.R. 873, 2007 SCC 21; Ab Currie, *The State of Civil Legal Aid in Canada: By the Numbers in 2011-2012* (Toronto: CFCJ, 2013) online: CFCJ <; Erika Heinrich, *Canadian Jurisprudence Regarding the Right to Legal Aid* (Vancouver: 2013) online: Lawyers' Rights Watch Canada <. However, family law legal aid funding was recently increased in Ontario, and litigants are more likely to have access to duty counsel or other limited-scope assistance as opposed to traditional certificates.

<sup>50</sup> Marshall Yarmus, "Yarmus: Ontario's crisis in family courts (Ottawa Citizen, July 27, 2015)," <; Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants," *supra* note 4; Julie Macfarlane, "Ontario Family Legal Services Review Offers Opportunity for Legal Profession to Show the Public it is Listening – and Cares (National Self-Represented Litigants Project Blog, May 16 2016)," <.

immigration problems or from minor criminal charges. However independent paralegals are forbidden to offer family law services in most if not all provinces.<sup>51</sup> Those who try can be prosecuted for the "unauthorized practice of law," whether or not there is any deficiency in the services offered.<sup>52</sup>

In Ontario, family law is excluded from the paralegal scope of practice,<sup>53</sup> although the Family Legal Services Review may recommend amendments to this rule.<sup>54</sup> In other parts of the country, such as British Columbia, there are no independent paralegals: they must be supervised by lawyers. Alberta is somewhat more tolerant of independent paralegals offering advice or coaching in family law, although they may not appear in court.<sup>55</sup>

Canadian family law remains an access to justice quagmire. This is because these are personal plight legal needs, but also because of financial factors and public policy decisions that distinguish family law needs from other types of personal plight legal need. Despite recent substantial research and media focus in recent years, there is no evidence that access to family justice is tangibly improving in Canada. How can we dig our way out of this quagmire?

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<sup>51</sup> Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Cheltenham, UK: Edward Elgar, 2015) at 49-50 [*Justitia's Legions*]; Noel Semple, "The three routes to justice for all (Lawyers Weekly, October 30 2015)," <.

<sup>52</sup> Joan Brockman, "Money for Nothing, Advice for Free: The Law Society of British Columbia's Enforcement Actions Against the Unauthorized Practice of Law" (2010) 29 Windsor Review of Legal and Social Issues 1, online: <; Semple, *Legal Services Regulation at the Crossroads*, *supra* note 51 at 47-48.

<sup>53</sup> Law Society of Upper Canada, "By-Law 4: Licensing. Adopted by Convocation on May 1, 2007; most recently amended October 19, 2015," <.

<sup>54</sup> Ministry of the Attorney General (Ontario), "Family Legal Services Review Consultation Paper (February 9, 2016)," <

<sup>55</sup> Law Society of Alberta, Law Society of Manitoba and Law Society of Saskatchewan, *Innovating Regulation* 2015).

## Part 2: Canada's Family Law Firms: Innovating for Accessibility?

One obvious place to look for access-enhancing innovation is the public justice "system,"<sup>56</sup> including courts and justice ministries as well as quasi-public entities such as legal aid commissions and law schools. Reformers and researchers have focused their energies here. However, the premise of this article is that Canada's family law *firms* (including sole practitioners) also have an essential role to play in the pursuit of access to justice. Even if the public sector family justice system were perfect, most people involved in divorce or separation would want a trusted, expert ally on their side in the event of litigation. More importantly, litigation should only ever be a last resort for separating people (or anyone else), given the enormous monetary, temporal, and emotional costs that it imposes.<sup>57</sup> Job number one for good family law professionals is not representing clients in court; job number one is keeping separating people out of family court by securing their legal rights through settlement negotiation and other alternative dispute resolution.<sup>58</sup> Innovation that lets family law firms provide these benefits to more separating Canadians is urgently needed.

A solid empirical understanding of Canada's family law firms and their approach to delivering services can help identify plausible access-enhancing innovations. To that end, this section will draw on two previously unreported data sources. First is aggregate data collected from Ontario lawyers' 2014 annual reports, provided to the author by the Law Society of Upper Canada.<sup>59</sup> Second is the author's interviews with 9

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<sup>56</sup> Arguably, these entities currently lack the coordination which the word "system" connotes: CBA A2J Committee, *Reaching Equal Justice: An Invitation To Envision And Act* (Ottawa: CBA, 2013) online: CBA <[http://www.cba.org/cba/equaljustice/secure\\_pdf/Equal-Justice-Report-eng.pdf](http://www.cba.org/cba/equaljustice/secure_pdf/Equal-Justice-Report-eng.pdf)> (last accessed: 3 June 2016) at 49; Action Committee on Access to Justice in Civil and Family Matters, "Access To Civil & Family Justice: A Roadmap for Change," *supra* note at 7.

<sup>57</sup> Semple, "The Cost of Seeking Civil Justice in Canada," *supra* note 2.

<sup>58</sup> Ntd Bala in Trebilcock at 274; Julie Macfarlane, *The new lawyer : how settlement is transforming the practice of law* (Vancouver: University of British Columbia Press, 2008)

<sup>59</sup> The author is grateful to the Law Society of Upper Canada, and in particular to Allison Cheron for generously providing this data. This research was authorized by University of Windsor Research Ethics

practicing family lawyers, conducted as part of a larger program of interviews with various personal plight practitioners.<sup>60</sup>

As a preliminary matter, it is worth noting that family law is one of the largest legal practice niches. 17% of all Ontario licensees, 4820 individuals in total, indicated that they provided some family law services in 2014. Family lawyers outnumber those in niches that may be better known such as criminal lawyers (who number 3701 in Ontario). Among the 20 practice niches recorded in the Law Society annual report data,<sup>61</sup> "family/matrimonial law" ranked 5<sup>th</sup>. Among all Ontario lawyers (including those who did no family law work), the average practitioner spent 8.82% of his or her working hours doing family law work.

How can these legal professionals help dig us out of the access to family justice quagmire? *Pro bono* service is the most straightforward option. Among the 4820 Ontario lawyers who did any family law work in 2014, almost half (48.9%) reported doing some *pro bono* work.<sup>62</sup> Ronit Dinovitzer's 2012 survey of new Canadian lawyers (in all practice areas) found that they did an average of 45 hours per year.<sup>63</sup>

Low bono is perhaps more common than pure *pro bono* in family law. Low bono means reducing the hourly rate, offering more flexible payment terms, or discounting

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Board Certificate Number 32411, granted June 19, 2015. No identifying information was provided to the author.

<sup>60</sup> University of Windsor Research Ethics Board Certificate Number 31927, granted February 25, 2015.

<sup>61</sup> The 20 practice areas on the form were: Aboriginal Law; ADR/Mediation Services; Administrative Law; Bankruptcy & Insolvency Law; Civil Litigation - Plaintiff; Civil Litigation – Defendant; Construction Law; Corporate/Commercial Law; Criminal/Quasi Criminal Law; Employment/Labour Law; Environmental Law; Family/Matrimonial Law; Franchise Law; Immigration Law; Intellectual Property Law; Real Estate Law; Securities Law; Tax Law' Wills, Estates, Trusts Law; Workplace Safety & Insurance Law.

<sup>62</sup> The data source does not indicate how much *pro bono* work they did; nor does it indicate whether the *pro bono* work was for family law clients as opposed to other types of clients.

<sup>63</sup> Ronit Dinovitzer, *Law And Beyond: A National Study Of Canadian Law Graduates* (Toronto: U, 2015) online: University of Toronto < at 26.



the final bill based on the client's modest means.<sup>64</sup> Accepting family law legal aid certificates, which pay much less than market rates,<sup>65</sup> is effectively *low bono* work for those family lawyers who could fill their calendars with clients paying higher rates.

Altruistic voluntarism is commendable and valuable. However, the accessibility-enhancing innovations that are most likely to be widely adopted by family law firms are those that maintain or even improve firm profitability. Thus, it is upon these innovations that the remainder of this section will focus.

## 2.1 Innovation in Price Structure

Unaffordability is the most important reason why separating people go without the family law services that they need and want.<sup>66</sup> According to the 2015 *Going Rate* survey conducted by *Canadian Lawyer* magazine, the average legal fee for representation in a contested divorce is \$13,638. Among those cases requiring a trial of "up to 5 days" the average reported figure was \$35,950.<sup>67</sup> A Toronto family lawyer explained the effect of legal fees on accessibility in her practice:

unless someone's a high income earner they can't afford legal fees... Anyone below \$50,000 per year or something like that, it's almost impossible to afford legal fees. I mean they're going to be paying child support, probably spousal support, probably

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<sup>64</sup> Anna Lund and Andrew Pilliar, *What Do Lawyers Do? Examining The Types Of Pro Bono, Low Bono And Voluntary Work Provided By British Columbia Lawyers* (Vancouver: Law Foundation of British Columbia, 2014); Luz E. Herrera, "Rethinking Private Attorney Involvement Through a "Low Bono" Lens" (2009) 43 *Loyola L.A. L. Rev.* 1, online: <.

<sup>65</sup> For civil matters, Legal Aid Ontario rates range between \$81.44 and \$136.43 per hour depending on seniority (Legal Aid Ontario, "Information for Lawyers: Tariff & Billing," <). The average market rate for family law services in Canada is approximately \$300 (Semple, "The Cost of Seeking Civil Justice in Canada," *supra* note 2 at 650-3).

<sup>66</sup> Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants," *supra* note 4 at 121; Birnbaum, Bala and Bertrand, "The Rise of Self-Representation in Canada's Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers & Litigants," *supra* note 36; Paul Vayda, "Chipping away at Cost Barriers: A Comment on the Supreme Court of Canada's Trial Lawyers Decision " (2015) 36 *Windsor Rev. Legal & Soc. Issues* 207, online: < at 208.

<sup>67</sup> Michael McKiernan, "The Going Rate: The 2015 Canadian Lawyer Legal Fees survey (Canadian Lawyer, June 2015)," <.

their mortgage... so getting legal fees to stretch in a situation like that, it's just not going to happen.<sup>68</sup>

In addition to the absolute prices being charged, two *price structure* factors further undermine affordability of family law firms. First, *time-based billing*, which is standard practice for Canadian family law firms,<sup>69</sup> requires clients to accept significant uncertainty about what the final price will be. Second, *upfront cash retainer requirements*, whereby the client must produce a four- or five-digit sum before any services are provided, are a major affordability impediment even for those who would be able to pay the full bill if given more time.

Exploring alternatives to the billable hour is an excellent opportunity to innovate for accessibility.<sup>70</sup> Under *flat fee* billing, a fixed amount is charged to either (i) provide a specific family law service (e.g. a consultation or document review), or (ii) represent the client up to a specific milestone in the litigation (e.g. mediation). Flat fee family law services are increasingly common in overseas jurisdictions. In England & Wales, 46% of family law firm clients who paid for their services did so through a flat fee, compared to only 28% who paid by the hour.<sup>71</sup>

Contingency fees are a more radical option for those family law clients who will eventually receive money from the other side.<sup>72</sup> Contingency billing a family law case

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<sup>68</sup> Family lawyer "FF." Female, Toronto, Called to Bar 2011. Interviewed May 5, 2015.

<sup>69</sup> Michael Carabash, *Is Time Running Out on the Billable Hour?* (Toronto: 2009) online: Dynamic Lawyers <; Erik S. Knutsen and Janet Walker, "What is the Cost of Litigating in Canada?" in Christopher Hodges, Stephan Vogenauer & Magdalena Tulibacka eds., *The Costs And Funding Of Civil Litigation: A Comparative Perspective* (Portland, Oregon: Hart, 2010) at Section III.A .

<sup>70</sup> Action Committee on Access to Justice in Civil and Family Matters, "Colloquium Report" (2014) at 15.

<sup>71</sup> Legal Services Consumer Panel (UK), "Tracker Survey 2015 - data tables for recent users" <.

<sup>72</sup> I.e. those who will receive child and/or spousal support, or a sum in respect of family property adjustment.

involves complexities and risks not found in personal injury and class action cases,<sup>73</sup> and this billing method is currently forbidden by Ontario law for family law cases.<sup>74</sup> However, contingency has significant affordability benefits. It offers both price certainty (including a no-win-no-fee guarantee that clients value) and postponement of fee payment until a moment when the client is in a better position to pay it.

### 2.1.1 Price Structure and Firm Size

The relatively small size of Canada's family law firms is an impediment to their adoption of innovative, accessible billing models. This is because models such as flat fees and contingency billing impose increased risks on the firm, compared to hourly billing with a cash retainer. For example, if the matter requires more labour than initially expected the firm does poorly on a flat fee. If the monetary recovery is unexpectedly low, the firm will do poorly on contingency. These risks do not seem to make the billing models less profitable in the long run (contingency-billed personal injury and class action practices are among the most lucrative of all legal niches), but they do increase the variability and unpredictability of the firm's revenues.

Larger firms are better able to absorb this variability, because they can spread the risk over a larger number of cases.<sup>75</sup> However, the average Ontario family lawyer in 2014 worked in a firm with only 6.2 lawyers,<sup>76</sup> and slightly over half (51%) of Ontario family lawyers are sole practitioners. By contrast, the average Ontario lawyer in private

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<sup>73</sup> Tali Folkins, "Time for contingency fees in family law? (Law Times (Ontario), June 8 2015)," < ; Olivia Carville, "Lawyers fight 'archaic' ban on no-win no-fee arrangements in family court (Toronto Star, May 31, 2015)," < .

<sup>74</sup> *Solicitors Act*, R.S.O. 1990, c. S.15, s. 28(3)(b).

<sup>75</sup> Semple, *Legal Services Regulation at the Crossroads*, *supra* note 51 at 164-167.

<sup>76</sup> The LSUC data recorded firm size in categories (i.e. "6-10 lawyers") as opposed to integers. For the purpose of this calculation, it was assumed that each lawyer's firm size was equal to the average of the upper and lower bounds of the firm size category. For example, all lawyers reported to work in firms of 6-10 were presumed to work in firms with 8 lawyers. "Family lawyer" is defined here to mean lawyers who did any family law work at all in 2014. Family law specialists (those who allocated at least 60% of their work hours to family law) had a slightly larger average firm size: 7.5 lawyers.

practice works in a firm of approximately 40 lawyers. In the UK and in Australia, firms with hundreds or even thousands of lawyers are now offering family law services, and as predicted these services are often made available on a flat fee basis.<sup>77</sup> By contrast, in Canada's six largest firms, among the thousands of lawyers, only four individuals practice family law.<sup>78</sup> Scaling up a family law firm is difficult in Canada due to the continuing regulatory prohibition of non-lawyer investment.<sup>79</sup> However those that can do so will find themselves in a strong position to move away from time-based, cash-retainer billing, and thereby serve a large untapped market.

## 2.2 Innovation in Service Variety

Variegation of services is the second type of innovation that family firms can pursue. The "traditional full-scope retainer" continues to characterize most family law services.<sup>80</sup> Under this model, the firm takes on full responsibility for solving all legal aspects of the client's problem, from beginning to end.<sup>81</sup> Commensurate with this responsibility, under the traditional full-scope retainer the firm rather than the client makes most of the major decisions about how and by whom the constituent legal tasks will be performed.

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<sup>77</sup> Semple, *Legal Services Regulation at the Crossroads*, *supra* note 51 at 167; note 71 *supra* and accompanying text.

<sup>78</sup> Canada's largest law firms were identified using the following source: Lexpert, "Canada's Largest Law Firms," <. The directories of lawyers on their websites were searched to identify family lawyers.

<sup>79</sup> Noel Semple, "Access to Justice: Is Legal Services Regulation Blocking the Path?" (2013) 21 *International Journal of the Legal Profession* 267, online: <.

<sup>80</sup> Lorne Sossin and Samreen Beg, "Should Legal Services be Unbundled?" in Michael Trebilcock, Anthony Duggan & Lorne Sossin eds., *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) at 199.

<sup>81</sup> Robert Harvie, "Checking Our Egos and Accepting Our Part is Fundamental to Restoring Public Trust in the Justice System (National Self-Represented Litigants Project Blog, December 3, 2014)," <<https://representingyourselfcanada.com/2014/12/03/checking-our-egos-and-accepting-our-part-is-fundamental-to-restoring-public-trust-in-the-justice-system/>> (last accessed: 3 June 2016).

### 2.2.1 Limited Scope Retainers

One innovative alternative is limited scope (also known as “unbundled”) services.<sup>82</sup> In these models, the firm’s responsibility to the client is limited to certain legal issues, to certain stages of the proceeding, or to certain constituent tasks but not others. The most important appeal of limited scope retainers is their affordability: the client pays less because he or she does more of the work personally instead of the firm. A limited scope service such as drafting a pleading is also much easier for a firm to price with a fixed fee, because the labour requirements are relatively predictable. A Sarnia family lawyer describes her pragmatic approach to limited scope retainers as follows:

The reality is people come in, they’ve got a problem, and I am trying to figure out how best I can help them. It is great if they can just hire you to do whatever. But the reality is depending on the services and their financial situation, some people can’t afford it. So it’s always been that figuring out what you can and can’t do for people.<sup>83</sup>

In addition to affordability, limited scope retainers offer flexibility and control to those clients who wish to keep more control of their cases.<sup>84</sup>

In personal plight niches like family law, the challenge of limited scope retainers is that the clients are typically legally inexperienced and under financial and emotional

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<sup>82</sup> Sossin and Beg, “Should Legal Services be Unbundled?,” *supra* note *ibid.* ; Action Committee on Access to Justice in Civil and Family Matters Family Justice Working Group, “Meaningful Change for Family Justice: Beyond Wise Words,” *supra* note 2; Law Commission of Ontario, “Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity,” *supra* note 5 at 65-6; Robert Harvie, “Self Represented Litigants – Lawyer Delivery Lagging? (Huckvale LLP blog, January 20, 2016),” <<https://huckvale.ca/family-law/self-represented-litigants-lawyer-delivery-lagging/>> (last accessed: 3 June 2016).

<sup>83</sup> Family lawyer “JJ.” Female, Sarnia, Called to Bar 1992. Interviewed May 26, 2015.

<sup>84</sup> CBA A2J Committee, “Reaching Equal Justice: An Invitation To Envision And Act,” *supra* note 56 at 37.

stress from the underlying crisis.<sup>85</sup> Even those who would be capable of handling some parts of their cases alone will have difficulty identifying which parts those might be.<sup>86</sup> Unlike general counsel in a large corporate client, they are not usually able to disaggregate their own legal needs and select appropriate portions to allocate to the firm.<sup>87</sup> Thus, family law firms need to take the lead in designing innovative and affordable ways to divide workload between firm and client.

### 2.2.2 Variegation on Multiple Axes

In addition to limited scope retainers, there are many other forms of service variety that family law firms could offer their clients. In an increasingly multicultural country, offering service in multiple languages is advantageous. Twenty per cent of Ontario's family lawyers personally provide services in at least one language other than English.<sup>88</sup> Further linguistic variety could be offered by firms that hire non-lawyer staff able to do client consultations and translate in other languages, or firms that use freelance or technologically-enabled translation services.

Physical location is another family law service characteristic that firms could variegate to increase accessibility. There is evidence of significant unmet demand in rural areas.<sup>89</sup> The number of lawyers per capita is typically higher in cities than it is in

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<sup>85</sup> Section 1.3.2, *supra*. CBA A2J Committee, "Reaching Equal Justice: An Invitation To Envision And Act," *supra* note 56 at 94. Regarding lawyers' perception that limited scope retainers increase the risk of client complaints to regulators and malpractice suits, see Harvie, "Checking Our Egos and Accepting Our Part is Fundamental to Restoring Public Trust in the Justice System (National Self-Represented Litigants Project Blog, December 3, 2014)," *supra* note 81.

<sup>86</sup> CBA A2J Committee, "Reaching Equal Justice: An Invitation To Envision And Act," *supra* note 56 at 94-5; Law Commission of Ontario, "Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity," *supra* note 5 at 65-6.

<sup>87</sup> Noel Semple, "Personal Plight Legal Services and Tomorrow's Lawyers" (2014) 2014 Journal of the Legal Profession 25, online: <ssrn.com/abstract=2436438> (last accessed: 3 June 2016) at 35.

<sup>88</sup> Law Society of Upper Canada Annual Report data, *supra* note 59.

<sup>89</sup> CBA Legal Futures Initiative, *The Future of Legal Services in Canada: Trends and Issues Report* (Ottawa: Canadian Bar Association, 2013) online: Canadian Bar Association < at 16; Sole Practitioner and Small Firm Task Force (Law Society of Upper Canada), *Final Report* (Toronto: LSUC, 2005) online: LSUC

rural areas, although data from the Ontario Civil Legal Needs project suggests that family lawyers are somewhat more evenly distributed around the province than other types of lawyers are.<sup>90</sup> In any case, the family law firm that innovatively offers its services in more different places – e.g. with consultation offices or “riding circuit” between communities – will meet more clients’ needs.

Even if the family law firm is in town, some clients find traditional offices intimidating. Jane Harvey Lawyers provides family law among other legal services from locations in malls in the Toronto area.<sup>91</sup> This firm offers weekend and evening hours; this is another service option that improves accessibility.

Of course, the assumption that a law firm must be physically proximate to its client is increasingly questionable. As Jamie Baxter and Albert Yoon argue in a recent paper, “legal service delivery is not strictly a local phenomenon.”<sup>92</sup> Their survey found that in the average Ontario family lawyer’s practice, 30% of the clients reside more than 25km away from the law office.<sup>93</sup> Deploying technology such as videoconferencing to serve clients in remote communities can create access to justice and attract new clients to a family law firm.<sup>94</sup>

### 2.3 Innovation in Division of Labour

Division of labour is a third opportunity for family law firms to innovate for accessibility. Operating a family law firm requires substantial “non-billable” work that is

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< at 45-46; Julian Franch, “Small Law Firm Revenue Generation Through Strategic Networking In Rural Communities (Unpublished manuscript, on file with the author)” (2016) at 13-14.

<sup>90</sup> Jamie Baxter and Albert Yoon, *The Geography of Civil Legal Services in Ontario* (Toronto: LSUC, 2012) at 51.

<sup>91</sup> “Jane Harvey Lawyers,” <. Axxess Law operates in Walmarts, although the firm does not advertise contested family law services. (<http://www.axesslaw.com/services/family>)

<sup>92</sup> Jamie Baxter and Albert Yoon, “No Lawyer for a Hundred Miles? Mapping the New Geography of Access of Justice in Canada” (2014) 52 Osgoode Hall Law Journal 9, online: <

<sup>93</sup> Baxter and Yoon, *ibid* at 38. However, in this survey lawyers in all of the other legal niches had larger proportions of clients more than 25km away.

<sup>94</sup> Franch, “Small Law Firm Revenue Generation Through Strategic Networking In Rural Communities (Unpublished manuscript, on file with the author),” *supra* note 89.

not connected to a particular file and may not even be legal in nature. Marketing, bookkeeping, and human resources administration are mundane examples. Passing this work from lawyers into less expensive hands reduces the overall cost of doing business, leading to greater accessibility and profitability. This is hardly news to family lawyers, almost all of whom use non-lawyer assistants, clerks, or paralegals to perform some of the necessary work more cheaply than lawyers. However, in niches such as personal injury law, non-lawyers are used much more extensively for client intake and consultation. Doing likewise may be an opportunity for Canadian family law firms.

Sole practitioners have limited opportunities to divide labour unless they send work outside of the firm. If the firm adds more lawyers, then labour can be further divided among lawyers. If a senior lawyer assigns work to a junior, and the junior do it just as effectively for a lower hourly rate, the firm has divided labour and increased efficiency and accessibility.

While division of labour is a familiar idea to all practicing lawyers, the principle can be taken much further.<sup>95</sup> Innovating for accessibility requires time for research and development of innovative practice models. Setting flat fees, for example, requires careful analysis of past cases as well as ongoing revision. This innovation-oriented R&D work calls for someone who can think systematically about the next 1000 cases that the firm will handle. A great practicing lawyer, by contrast, tends to be single-mindedly focused on the one case at hand.

Innovation for accessibility would be facilitated by new faces at the family law firm boardroom table, bringing new capital for expansion and new expertise in fields

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<sup>95</sup> Mitch Kowalski, "De-Constructing Legal Services (Slaw.ca, March 7th 2013)" (2013) : "successful law firms of the 21<sup>st</sup> Century will be those who re-jig their staffing models to ensure that work is done by the lowest cost, yet appropriately skilled, provider – or the work is done by technology"



such as project management, technology and marketing.<sup>96</sup> Unfortunately vestigial business structure rules in North American jurisdictions forbid law firms to bring these new faces to the table as investors or managers.<sup>97</sup> However, even if these rules persist there is still some scope for dividing labour with non-legal experts by employing them or using them as consultants.

The large American consumer law firms of the 1990s (e.g. Jaccoby & Myers and Hyatt Legal Services) retained these human resources at their respective central offices. They leveraged them to make services at their network of hundreds of storefront offices more accessible and profitable. Sociologist Jerry Van Hoy, who was embedded in two of these firms for months, describes the arrangement:

administrative offices provide a number of services to help ensure the smooth bracket and profitable bracket operation of branch offices. These include advertising, accounting and bookkeeping services, dispersal of funds to pay off... expenses, help with hiring office staff, providing temporary staff to cover offices during sickness or vacations, negotiating office rental agreements and general advice about the operation of offices and legal matters.<sup>98</sup>

These "franchise" law firms offered fixed fee services in contested family law matters among other personal plight and personal business legal needs: an accessible proposition that is very rare in Canadian family law practice today.<sup>99</sup> The firms were also innovative in their approach to advertising and locating their practices. Although the Hyatt and Jaccoby firms subsequently (and somewhat mysteriously) moved away

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<sup>96</sup> Frank Stephen, "Chapter 8: A technological revolution in 'lawyering'?" in *Lawyers, Markets, and Regulation* (Cheltenham, UK: Edward Elgar, 2013); Gillian K. Hadfield, "The Cost of Law: Promoting Access to Justice through the Corporate Practice of Law" (2014) 38 *International Review of Law and Economics* forthcoming, online: <; Gillian Hadfield, "Legal Infrastructure and the New Economy" (2013) 8 *I/S: A Journal Of Law And Policy For The Information Society* 1, online: <; Semple, *Legal Services Regulation at the Crossroads*, *supra* note 51 at 175.

<sup>97</sup> Semple, "Access to Justice: Is Legal Services Regulation Blocking the Path?," *supra* note 79.

<sup>98</sup> Jerry Van Hoy, *Franchise Law Firms and the Transformation of Personal Legal Services* (Westport, CT: Quorum Books., 1997) at 98.

<sup>99</sup> *Ibid.* at 17, 58-9.

from family law, their model shows how division of labour, along with scale, can enable innovation for accessibility in family law practice.

Richard and Daniel Susskind envision an even more radical division of professional labour, one that would spread the work well beyond the walls of the firm. They argue that

professional work should be decomposed, that is, broken down into its constituent 'tasks'—identifiable, distinct, and separable modules of work that make it up. Once decomposed, the challenge then is to identify the most efficient way of executing each type of task, consistent with the quality of work needed, the level of human interaction required, and the ease with which the decomposed tasks can be managed alongside one another and pulled together into one coherent offering.<sup>100</sup>

Once legal work is disaggregated in this way, the Susskinds expect the labour to be divided very broadly: not just within the law firm but also to legal process outsourcers in overseas jurisdictions and, importantly, to increasingly intelligent machines.<sup>101</sup> This process can improve service quality and reduce the cost of doing business, thereby permitting profitability at more affordable price points.

This advanced division of labour by law firms is already lowering costs and increasing efficiency for large corporate clients.<sup>102</sup> It has not yet extended to family law cases, which are more difficult to disaggregate due to their small size and inexperienced clientele.<sup>103</sup> Nevertheless, applying advanced "Susskindian"

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<sup>100</sup> Richard Susskind and Daniel Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (New York: Oxford, 2015) at 212.. See also Richard E. Susskind, *Tomorrow's lawyers : an introduction to your future* (Oxford, United Kingdom: Oxford University Press, 2013) at Chapter 4.

<sup>101</sup> Susskind and Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts*, *supra* note 100 at 121-123.

<sup>102</sup> Susskind and Susskind, *ibid* at 67 *et seq.*

<sup>103</sup> Semple, "Personal Plight Legal Services and Tomorrow's Lawyers," *supra* note 87 at 35-36.

decomposition to family law files is a promising opportunity to innovate for accessibility.

## Part 3: For a Third Revolution in Canadian Family Law

### 3.1 The First Revolution: Doctrinal Reform

Over the past half-century, very important progress has taken place in Canadian family law. A doctrinal revolution began with the 1968 *Divorce Act*, which for the first time made divorce broadly available to those who no longer wished to remain married.<sup>104</sup> In the 1980s and 1990s, the broad contours of Canadian financial family law were established : statutory entitlements to division of matrimonial property, child support, and spousal support.<sup>105</sup> The creation of the Child Support Guidelines,<sup>106</sup> and then the Spousal Support Guidelines,<sup>107</sup> made these areas of the law increasingly clear and non-discretionary.<sup>108</sup> Over roughly the same time period, child custody and access law settled upon the best interests of the child standard which remains its "golden rule."<sup>109</sup>

The legalization of same sex marriage in the mid-2000s was arguably the last battle in Canadian family law's doctrinal revolution. Naturally the law will continue to evolve. However, it seems very unlikely that the next half-century will produce doctrinal changes comparable to those of the past half-century. The powerful feminist and same-sex rights movements have accomplished their doctrinal reform goals in

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<sup>104</sup> The 1985 *Divorce Act* extended this liberalization.

<sup>105</sup> Carol Rogerson, *The Life and Times of the F.L.A. (25th Anniversary of the Family Law Act Conference, Law Society of Upper Canada, Toronto, March 1, 2011)* (Toronto: 2011) online: Law Society of Upper Canada <<http://ssrn.com/abstract=2182052>> (last accessed: 3 June 2016).

<sup>106</sup> *Federal Child Support Guidelines*, SOR/97-175 and provincial equivalents.

<sup>107</sup> Rogerson and Thompson, "Spousal Support Advisory Guidelines (Final Version)," *supra* note .

<sup>108</sup> Rogerson, "Shaping Substantive Law to Promote Access to Justice: Canada's Use of Child and Spousal Support Guidelines," *supra* note 2.

<sup>109</sup> Noel Semple, "Whose Best Interests? Custody and Access Law and Procedure" (2010) 48 Osgoode Hall Law Journal 287, online: <<http://digitalcommons.osgoode.yorku.ca/ohlj/vol48/iss2/3>> (last accessed: 3 June 2016).

family law, and now generally focus their attention elsewhere. Other movements that dispute the doctrinal status quo, such as men's rights groups and social conservatives, seem to lack the power to effect change.<sup>110</sup>

### 3.2 The Second Revolution: Alternative Dispute Resolution (ADR)

Canadian family law has also experienced, and benefited from, an alternative dispute resolution (ADR) revolution. The mediation of family law cases began in earnest in the early 1980s. It was soon endorsed in the *Divorce Act*.<sup>111</sup> Thirty years on, family mediation is a flourishing profession, with its own trade groups, certifications, and extensive scholarship.<sup>112</sup> Legal aid and justice system administrators now promote and fund mediation as a litigation alternative, which is better for the families involved and also (perhaps not coincidentally) cheaper for the taxpayer.

Other ADR options have proliferated. Collaborative family law lets the parties commit mutually to a non-litigated outcome, while giving them the benefit of extensive support from lawyers and other professionals.<sup>113</sup> Mediation-arbitration combines the advantages of mediation with the certainty of arbitration, while keeping separating parties out of court. Over-reliance on family law ADR has been criticized for disadvantaging vulnerable spouses and for eroding the public benefits of adjudication.<sup>114</sup> However, this second revolution in Canadian family law has given separating spouses more options than ever before for resolving their disputes without litigation, as well as more state support than ever before for those who choose mediation. This is a good thing.

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<sup>110</sup> Semple and Rogerson, "Access To Family Justice: Insights And Options," *supra* notes *supra* note 31 at 417.

<sup>111</sup> Divorce Act, RSC 1985, c 3 (2nd Supp), s. 9(2).

<sup>112</sup> E.g. "Ontario Association of Family Mediators," < ; "Family Dispute Resolution Institute of Ontario," <.

<sup>113</sup> Pauline H. Tesler, "Collaborative Law: What It Is and Why Lawyers Need to Know About It" (1999) 2008 American Journal of Family Law 215, online: < . ; {Boyd, #5894}.

<sup>114</sup> Noel Semple, "Mandatory Family Mediation and the Settlement Mission: A Feminist Critique" (2012) 24 Canadian Journal of Women and the Law 207, online: <.

### 3.3 The Third Revolution: Innovation for Accessibility

Thanks to the doctrinal revolution, we have family laws on the books which are generally acknowledged to be fair and just. Thanks to the ADR revolution, we have numerous options for consensual resolution of separation-related disputes. A time-travelling lawyer from 1965 would be astonished, and probably impressed, by how far we have come in these respects.

However, the fruits of this progress will remain beyond the reach of most Canadians until the profession foments a third revolution: innovation for accessibility in family law practice. Most separating people will continue to want and need partisan legal professionals to at least advise and often to represent them. Having a legal professional on one's side is a benefit enjoyed by all too few separating people. From society's point of view, partisan family law practice is essential, to ease self-representation's severe impact on the courts and to ensure that children and spouses are provided for in the wake of divorce and separation.

That this third revolution has not yet occurred is obvious. Our time traveller would be unsurprised by the way family law is generally *practiced* in Canada today: solos and small firms working from traditional offices during business hours, requiring large cash deposits to work on traditional full scope retainers billed by the hour. These lawyers generally deliver high quality work and many of them represent legal professionalism at its finest, but they are simply beyond the reach of most people who need them.

The Canadian Bar Association's *Futures* Report captures succinctly the relationship between law practice innovation and access to justice. A key indicator of the success of

innovation will be its impact on access to legal services. If more Canadians are able and willing to use lawyers and the justice system for their legal needs, then the legal profession will have

responded to the expressed needs of clients and potential clients, who today indicate that legal services are too costly for them to access except in the most dire of circumstances... the profession's duty to act in the public interest requires it to do more in transforming access to legal services.<sup>115</sup>

### 3.4 Conclusion

This Article began by arguing that family law is one of this country's worst access to justice quagmires. Every year, hundreds of thousands of Canadians find themselves in need of family law's financial, child-related, and domestic violence-related remedies.<sup>116</sup> Access to family justice is challenging because -- as with other personal plight needs -- the needs are novel in the person's life, there is an underlying life crisis, and legal fees are hard to afford. However, access to family justice also has unique barriers: no pot of gold at the end of the rainbow, very limited legal aid, and lack of paralegal service options.

There are three broad areas in which family law firms can innovate to meet these unmet needs, and tap this untapped market. Price structure innovation means moving from open-ended time based billing and large upfront cash retainers into more terms that are more affordable for clients (and potentially at least as profitable for firms). Service variety innovation involves limited scope retainers, but also innovation in service modality and location. Finally, firms can divide the labour involved in family law practice in more innovative ways, through efficient use of non-lawyer support staff and collaborations with non-lawyer talent for managerial improvements and research and

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<sup>115</sup> CBA Legal Futures Initiative, "Futures: Transforming the Delivery of Legal Services in Canada," *supra* note 12 at 32.

<sup>116</sup> Farrow *et al.*, "Everyday Legal Problems and the Cost of Justice in Canada: Overview Report," *supra* note 12 at 7; Canadian Forum on Civil Justice, "Everyday Legal Problems And The Cost Of Justice In Canada: Survey," *supra* note 12 at 2.

development. Firms that scale up will have an advantage in all of these innovation opportunities.

When called to the bar, Ontario lawyers swear that they will “seek to ensure access to justice and access to legal services.”<sup>117</sup> Across the country, most lawyers would probably agree with the spirit of this aspiration. This means that, in addition to duties to clients and the courts, lawyers have a collective duty to make their work accessible to the public. Therefore, unless we naively choose to wait for huge infusions of state funding, radical procedural simplification, or sudden reversion to traditional marriage-for-life, the time has come to launch Canada’s third family law revolution: innovation for accessibility in family law firms.

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<sup>117</sup> Law Society of Upper Canada, *supra* note 53 at s.21(1).